

Migratory Bird Treaty Act
DRAFT - Instruction Memorandum

EMAIL TRANSMISSION –
Instruction Memorandum No. MT-2012-
Expires: 09/30/2013

To: Montana/Dakotas Leadership Team

From: State Director

Subject: Guidance for the Montana/Dakotas Bureau of Land Management to Meet Responsibilities Under the Migratory Bird Treaty Act and Executive Order 13186.

Program Area: All Program Areas

Purpose: The purpose of this Instruction Memorandum (IM) is to provide guidance and clarification for the BLM to meet responsibilities under the Migratory Bird Treaty Act (MBTA) and Executive Order 13186. The guidance establishes a consistent approach for addressing migratory birds and habitats when adopting, revising or amending land use plans and when making project level decisions.

Background:

The Migratory Bird Treaty Act (MBTA) is the cornerstone of migratory bird conservation and protection in the United States. The MBTA implements four treaties that provide for international protection of migratory birds.

Executive Order 13186 (January 2001) requires the BLM to ensure MBTA compliance, evaluate Bureau actions and agency plans on migratory birds, initiate actions to minimize take of migratory birds and contribute to the conservation of migratory birds.

The MBTA is a strict liability statute, meaning that proof of intent, knowledge, or negligence is not an element of an MBTA violation. The statute's language is clear that most actions resulting in a "taking" or possession (permanent or temporary) of a protected species, in the absence of regulatory authorization, are a violation of the MBTA.

The MBTA states,

"Unless and except as permitted by regulations ... it shall be unlawful at any time, by any means, or in any manner to pursue, hunt, take, capture, kill ... possess, offer for sale, sell ... purchase ... ship, export, import ... transport or cause to be transported ... any migratory bird, any part, nest, or eggs of any such bird [The Act] prohibits the taking, killing, possession, transportation, import and export of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior." 16 U.S.C. 703.

Migratory Bird Treaty Act DRAFT - Instruction Memorandum

The word “take” is defined by regulation as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 50 C.F.R. 10.12. The MBTA provides criminal penalties for persons who commit any of the acts prohibited by the statute in section 703 on any of the species protected by the statute. *See* 16 U.S.C. 707.

The United States Fish and Wildlife Service (FWS) maintains a list of species protected by the Act. *See* 75 Fed. Reg. 9281 (Mar. 1, 2010). This list includes over 1,000 species of migratory birds, including eagles and other raptors, waterfowl, shorebirds, seabirds, wading birds, and passerines. The MBTA does not protect non-migratory upland game birds and 30 introduced species such as the house (English) sparrow, European starling, rock dove (pigeon), and Eurasian collared-dove.

Adherence to this guidance, when developing and implementing land use plans and when planning and implementing projects, will provide for migratory bird conservation on BLM lands. It is not possible to eliminate all impacts to migratory birds through these actions nor do these actions absolve the BLM from MBTA liability. However, these guidelines and continued communication with the USFWS will avoid, minimize, and mitigate significant adverse impacts to species protected under the MBTA as documented and disclosed through the appropriate level of environmental analysis.

Policy/Action: The following will provide migratory bird conservation policy for planning and project development in the Montana/Dakotas BLM organization as required in the Memorandum of Understanding (MOU) between the U.S. Fish and Wildlife Service and Bureau of Land Management signed on April 12, 2010 (Attachment 1).

Land Use Planning Guidance: The following guidance will ensure that migratory bird conservation is consistently addressed during land use plan revisions and amendments.

Chapter 1. Introduction Applicable Legal and Regulatory Requirements:
Include the Migratory Bird Treaty Act of 1918.

Chapter 2. Alternatives

1. Management Common to All Alternatives:

Management Actions –Wildlife

- A. Through the permitting process for all land use authorizations, the BLM will promote the maintenance and improvement of habitat quantity and quality and avoid, reduce or mitigate adverse impacts to habitats of migratory birds and especially conservation priority species of migratory birds
- B. Powerlines and substations constructed on BLM land would comply with the most current raptor protection standards (currently Suggested Practices for Avian Protection on Power Lines: The State of the Art 2006).
- C. Other actions as appropriate

2. Alternative Development: Incorporate goals, objectives and other land use plan decisions into a range of alternatives based on the information describing the

Migratory Bird Treaty Act DRAFT - Instruction Memorandum

relative importance of the planning area to migratory birds and the designation of priority bird species as identified in chapter 3 (Affected Environment). Land use plan decisions should be clear and sufficiently detailed to achieve desired habitat conditions for migratory birds. This may include identifying stipulations or conditions that would be applied to mitigate impacts to priority species or habitats or designating actions to restore and enhance habitats where needed and appropriate and/or included as an appendix to your land use plan.

Alternatives may incorporate:

- A. Goals and objectives for desired habitat. The desired outcomes can be derived from pertinent research or plans with actions to maintain, restore, or enhance the habitats for migratory birds and especially conservation priority species of migratory birds (as identified in the LUP). Appropriate plans include the following:
 - Bird Conservation Region (BCR) plans
 - Partners In Flight (PIF) Bird Conservation Plans
 - Partners in Flight North American Landbird Conservation Plan
 - Waterfowl Management Plans
 - Shorebird Conservation Plan
 - The North American Waterbird Conservation Plan
 - Audubon's Important Bird Areas
 - State Wildlife Action Plans (Montana, North Dakota, South Dakota) - <http://www.wildlifeactionplans.org/>
 - Recovery plans and conservation plans/strategies
- B. Management actions, land use allocations, and/or resource use restrictions needed to achieve desired habitat conditions for migratory birds and especially conservation priority species of migratory birds while maintaining an ecological balance and multiple-use relationship for the planning area.
- C. Best Management Practices and mitigation guidelines for management actions or categories of actions to avoid or minimize unintentional take of migratory birds.

Chapter 3. Affected Environment

Describe in general migratory birds found in the planning area and identify priority migratory bird species for the planning area. Priority species may include a subset of the Species of Concern found in the planning area or other migratory bird species. Priority species should be developed based on factors such as the planning area's level of responsibility for a species or habitat type at a regional or national scale; rarity or risk for population declines at local, regional, or higher scales; density or size of populations; and/or public interest. In addition, identify critical areas of migratory bird concentrations, including, but not limited to: staging areas, winter ranges, migration stopovers or corridors, or other areas of seasonal importance. Identify current issues

Migratory Bird Treaty Act DRAFT - Instruction Memorandum

causing limitation, restriction, and/or degradation of important habitat and/or migratory bird populations, especially priority migratory bird species.

Describe the geographic location, distribution, condition of priority migratory bird habitat to help guide land use allocations and/or management decisions. Regional knowledge of migratory bird populations, distribution, and habitat, gained through broad scale assessments, can highlight the importance of an area in the context of the larger ecoregion. Identifying areas important to migratory birds enables resource specialists and managers to understand unresolved resource conflicts when establishing land use allocations and/or management requirements. This information is fundamental to developing a range of alternatives and analyzing the effects of the alternatives in the land use plan, and to manage for “the health, diversity, and productivity of the public lands.”

Chapter 4. Environmental Consequences

Address effects of actions authorized in land use plans on migratory birds and their habitats, especially conservation priority species of migratory birds as determined in the effected environment section.

The effects analysis should include a discussion about the effects on migratory birds in general, including critical areas of migratory concentration, as well as specific effects on priority migratory bird species and their habitats by alternative. The analysis should address the amount of affected habitat(short-term and long-term), the relative effects on these habitats (locally and regionally), and the direct, indirect, and cumulative impacts of each alternative on these habitats over the landscape.

Record of Decision (ROD)

Monitoring:

- A. Consider monitoring species response to habitat management as tools for evaluating Land Use Plan effectiveness.
- B. Develop, where appropriate, priority migratory bird habitat needs and incorporate them into Land Health Standards.

Project Level Guidance: Migratory birds should be included in every NEPA analysis of actions that have a potential to negatively or positively affect migratory birds to identify where take reasonably attributable to agency actions may have a measurable negative effect on migratory birds, or where actions may improve habitat for migratory birds, **focusing first on priority migratory bird species, priority habitats, critical areas, and key risk factors**. The BLM will implement approaches lessening the effects of agency actions when actions may have negative effects. When considering impacts to migratory birds, it is important to focus on bird populations as opposed to individuals and also recognize that actions that may provide long-term benefits to migratory bird populations as a whole may also have localized and/or short-term negative impacts on individual birds (BLM MOU WO-230-2010-04). The following guidance

Migratory Bird Treaty Act DRAFT - Instruction Memorandum

will ensure that conservation of migratory birds is consistently addressed during project planning.

Purpose and need: Migratory birds do not need to be discussed in this section unless the action is for habitat improvement for migratory birds.

Conformance: In this section, discuss whether or not the proposed action is in conformance with the land use plan and identify MBTA, EO 13186, BLM IM 2008-050, and the MOU with the FWS as appropriate.

Alternatives: Address migratory birds as appropriate under each alternative.

Affected Environment: Describe priority migratory bird species or habitat (including identified critical habitat) for these species within the proposed action area. Identify any known critical areas for migratory birds, including, but not limited to: staging areas, important winter ranges, nesting colonies, migration stopovers or corridors, or other areas of seasonal importance. Identify any areas of intact habitat with the potential for fragmentation, for those species needing large contiguous blocks of habitat.

Effects Analysis: Consider the following when addressing impacts to migratory birds.

- a. If the proposed project or action does not have the potential to impact migratory bird species, then document no impact.
- b. If the proposed project or action has the potential to impact migratory bird species, discuss the potential short-term and long-term impacts to migratory birds from the estimated destruction of eggs, nests and nesting habitat, fragmentation of habitat, reduction in habitat patch size, human presence, noise, commotion, etc., **focusing first on priority migratory bird species, priority habitats, critical areas, and key risk factors.** Some treatments occurring during the breeding season may have a high potential to take individual migratory birds, but the long term effect of the habitat treatment will likely result in habitat features which can reasonably assume to benefit or not result in reductions of habitat for priority species of migratory birds. In addition, habitat treatments for wintering priority species of migratory birds may take priority over needs of breeding migratory birds in the treatment area if treatments are most successful when conducted during the breeding season.
- c. Relate to cumulative and long-term impacts on migratory bird populations (i.e., will the proposed action impact an individual species' overall population within a given area, or region?).
- d. Address direct and indirect effects on migratory birds and their habitats.

Cumulative impacts: If applicable, the analysis of effects of an action should include a discussion about the effects on migratory bird species and their habitats at both the local (project area) and broad scale (regional). The NEPA analysis should address the amount of affected habitat, the relative abundance of these habitats over the landscape and the effects of other past

Migratory Bird Treaty Act
DRAFT - Instruction Memorandum

and on-going projects. Address how the project would relate/affect the overall condition of land health in the area.

Conservation Measures: Measures to minimize, reduce, or avoid unintentional take of migratory birds should be applied to all actions and projects where there is potential to impact migratory birds. Practices should be applied to provide long-term benefits and improved bird habitat condition. Conservation measures may be applied to all action alternatives. The proposed project or action should evaluate options to mitigate, minimize or eliminate the identified impacts. Projects or actions with the potential to impact large numbers of migratory birds spatially or temporally should include a site specific Avian and Bat Protection Plan (ABPP). If there is a high probability of significant adverse impacts to priority migratory bird species or their habitats that cannot be adequately mitigated, the proposed action or project should be abandoned.

Specific conservation actions will vary based on which priority migratory bird species, priority habitats, critical areas, and key risk factors are involved. More stringent mitigation will be required for projects with greater impacts to priority species.

Examples of conservation actions include but are not limited to:

- a) Minimize/avoid impacts to nesting migratory birds by imposing a Timing Limitation on use authorizations to mitigate disturbing and disruptive activities during the primary portion of the nesting season. Most migratory birds in Montana/Dakotas nest from April 15 to July 15. Timing Limitations may be modified based upon the species and habitats involved, current environmental conditions, and the timing of breeding activity of the migratory bird species found in the planning area (i.e., higher elevation habitats may start and end later).
- b) Where disturbance cannot be avoided during the nesting season, the scale and duration of disturbance may be considered mitigating circumstances. Actions or projects that have intense impacts during one season, but do not reoccur should be preferable to lower intensity actions that occur over multiple breeding seasons. Removal of nesting habitat prior to migratory bird primary nesting season for some actions, such as pipelines and road construction, may also mitigate impacts of surface disturbing activities allowed during the primary nesting season; however, surface disturbance will be restricted to the amount that would have been disturbed during the breeding period.
- c) Inventory project areas for migratory bird nests for actions occurring during the primary nesting season. These inventories should be performed by qualified personnel (wildlife biologists or trained resource specialists with experience conducting bird surveys) approved by BLM. All BLM resource programs that may have an effect on migratory birds through their actions or authorizations are responsible, as benefiting activities, for funding surveys. Proponents outside BLM will be responsible for funding surveys. If any active migratory bird nests are found within the project area and a 300-foot buffer, the project will not continue until nesting activities have been completed. The project or activity may proceed if no nests are found. Require a second nest-search survey if surface disturbing activities begin more than 5 days after completion of surveys. Activities may begin at the end of the primary

Migratory Bird Treaty Act
DRAFT - Instruction Memorandum

breeding season. The intent of the inventories is to locate migratory bird nests in the project area and avoid impacts to identified nests and birds. The methodology, extent of the area surveyed, and mitigation measures, should be designed to ensure this intent is met.

d) Minimized migratory bird mortality at water tanks on BLM land through the use of functional wildlife escape ramps. Use new tanks with built in escape ramps and/or install effective escape ramps in existing tanks.

e) Explore opportunities to replace lost or altered habitat on or off the project area based upon the needs of priority migratory bird species.

f) Minimize migratory bird mortalities from collisions with fences, towers and powerlines through marking of potential problem areas.

g) Prevent bird entry into heater vents at oil and gas production facilities.

h) Remove, permanently cap, or otherwise prevent bird entry into vertical pipes including PVC mining claim markers.

Emergency situations and casual use would be exempted from this IM.

Timeframe: Effective immediately.

Budget Impact: Some staff time will be required to provide and address migratory bird data and impacts in planning and NEPA documentation and in the on-ground surveys preceding disturbance/disruptive activities.

Manual/Handbook Sections Affected: None

Coordination: This IM was coordinated by the Branch of Planning and Biological Resources (MT923).

Contacts: If you have questions or need further guidance, please contact John Carlson, Wildlife Biologist, at (406) 896-5024.

1 Attachment

1-Final BLM-FWS Memorandum of Understanding (14 pp)